IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MERVIN C. McKINNEY, Appellant, vs. JOSEPH BOYLE, EDITH WHITE BOYLE, his wife, and REBA J. BOYLE, et al., Appellees.	No. 22374 Misc. No. 3608

APPELLEES' BRIEF

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TABLE OF AUTHORITIES

Cases:

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STATEMENT OF BASIS OF JURISDICTION

Appellees Boyle respectfully submit that this Honorable Court is without jurisdiction of this case. As appears from Appellees Boyle's motion to dismiss, which has been previously submitted and is incorporated herein by reference, final order of dismissal with prejudice was entered in this action by the court below on or about December 4, 1962. No appeal from that order has ever been taken, and the time for appeal has long since expired. On June 19, 1967, over four and a half years later, long after the one-year period prescribed by Rule 60 (b) for motions to set aside a judgment by reason of fraud, Appellant McKinney alleging fraud filed his motion to

vacate the order of dismissal. In the case of Kathe v. United States, 284 F. 2d 713, this Court held that under virtually identical circumstances, the court was without jurisdiction to set aside the judgment.

STATEMENT OF CASE

COME NOW Appellees Boyle, and pursuant to Rule 3, Rules of the United States Court of Appeals for the Ninth Circuit, controvert Appellant's Statement of the Case, and respectfully propound the following Statement of the case.

On or about April 26, 1961, Appellant Mervin C. McKinney brought suit in the court below against Appellees Boyle. Mr. McKinney was represented by the firm of Baumann & Rosengren of Scottsdale, Arizona. (A.R. 9) In his complaint, McKinney alleged that on April 7, 1961, he was in an automobile accident near the intersection of Apache Boulevard and Lebonnon Street, in Tempe, Arizona, and that at said time and place there was a collision between a 1961 rented Cadillac, which McKinney was operating, and a 1953 Ford two-door automobile, owned by Appellees Joseph and Edith White Boyle, and operated by their minor daughter, Reba J. Boyle. (A.R. 1)

On or about May 25, 1961, Appellees Boyle filed an answer to Appellant's complaint, and also filed a counterclaim against Mr. McKinney for injuries suffered by Reba J. Boyle

in the accident, and crossclaimed against Mike C. Gamboa and Mary M. Gamboa, his wife, the owners of a 1953 Ford automobile which was also allegedly involved in the accident, which vehicle was being operated by Ray M. Gamboa, a minor, their son. (A.R. 12)

On June 14, 1961, a reply to the Boyle's counterclaim was filed on Mr. McKinney's behalf by and through his attorneys, Jennings, Strouss, Salmon & Trask, of Phoenix, Arizona. (A.R. 23) Thereafter, Mr. McKinney was represented in the action not only by Mr. Rosengren, but also by the firm of Jennings, Strouss, Salmon & Trask.

On December 4, 1962, pursuant to a formal written stipulation signed not only by Appellees' counsel, but also by both firms of attorneys representing Mr. McKinney, the late U. S. District Court Judge, Arthur M. Davis, entered an order dismissing the case with prejudice, each of the parties to bear their respective costs. (A.R. 49) Thereafter, on or about June 19, 1967, over four and one-half years later, Appellant McKinney filed his motion to vacate and set aside the order of dismissal. (A.R. 52)

On September 11, 1967, oral argument of Appellant's motion was held before the Honorable William P. Copple, Judge of the United States District Court for the District of Arizona, and following the hearing of argument and the examination of the briefs of counsel, Judge Copple entered an order

denying Appellant's motion to vacate the judgment of dismissal. (A.R. 82) Although Mr. McKinney did not attend the hearing, he was ably represented there by Attorney James L. Corbett, Esquire, of Phoenix, Arizona, who had been retained by Mr. McKinney to represent him in the matter. (R.T. 2)

Thereafter, Appellant discharged Mr. Corbett (A.R. 88), and filed notice of appeal in propria persona. (A.R. 89)

ISSUE PRESENTED

Did the court below err in denying Appellant's motion to vacate judgment of dismissal with prejudice where the motion, based upon grounds of alleged "fraud," was not filed by Appellant until four and a half years after entry of the judgment of dismissal?

ARGUMENT

Appellant's pleadings and brief herein are replete with vicious, irresponsible and totally unfounded accusations of fraud and chicanery.

In order that the court may not draw any adverse inference from their silence, Appellees Boyle and their counsel categorically, emphatically and unequivocally deny Mr. McKinney's malicious accusations. Nothing more in this

regard need or will be said in the remainder of this brief.

As stated before, the final order of dismissal with prejudice in this case was entered on December 4, 1962. Rule 60 (b), Federal Rules of Civil Procedure, states:

> "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . 3. . . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) (fraud) not more than one year after the judgment, order or proceeding was entered or taken." (emphasis added)

Appellant purports to complain of the entry of a final order of dismissal with prejudice over four and one-half years after the order was entered. Appellant's motion was patently not timely made, and the court below was without jurisdiction to entertain it.

The rule is explained as follows:

> "But the concept of reasonable time cannot be used to extend a one year limit. A motion under clauses (1), (2) or (3) must be denied as untimely if made more than one year after judgment, regardless of whether the delay was reasonable." 3 Barron and Holtzoff, Federal Practice and Procedure, 421-2, §1330.

In the case of Kathe v. United States, 284 F. 2d 713 (9 Cir. 1960), this Honorable Court held that where a motion to vacate a judgment or final order was filed more than three years and eight months after the entry of the judgment, the District Court was without jurisdiction to entertain the motion. To the same effect, see Mitchell v. Board of Governors,

etc., 145 F. 2d 827 (9 Cir. 1944) cert. den. 324 U.S. 845, 68 S. Ct. 677, 89 L. Ed. 1407.

Appellees Boyle respectfully submit that the order of the court below denying Appellant's motion to vacate the judgment was completely correct, and that the appeal herein should be dismissed and the decision of the court below affirmed.

Respectfully submitted

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AFFIDAVIT OF MAILING

STATE OF ARIZONA)
) ss
COUNTY OF MARICOPA)

LEROY W. HOFMANN, being first duly sworn, upon his oath deposes and says: That he, on the 8th day of March, 1968, deposited in the United States Mail, at Phoenix, Arizona, with postage prepaid thereon, two (2) copies of the foregoing Appellees' Brief, addressed to

Mervin Carlos McKinney, prose.
P. O. Box B - 1030
Tamal, California

LEROY W. HOFMANN

Subscribed and sworn to before me, this 8th day of March, 1968.

/s/ Sylvia Cobb
Notary Public

My Commission expires:
2/3/72

C E R T I F I C A T E

I, LEROY W. HOFMANN, certify that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and, in my opinion, the foregoing Brief is in full compliance with those Rules.

KENNETH S. SCOVILLE

By _____
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